

February 20, 1996

SAMHSA IMPLEMENTATION ISSUES

1. *Which State agency will be responsible for implementing the SAMHSA rules?*

SAMHSA says that the required inspections need not be performed by the State's alcohol and other drug abuse prevention and treatment agency, but may be carried out by, or under the direction of, other State agencies. 61 Fed. Reg. 1494 (1996). With respect to responsibility for enforcing the State's minimum sales-age law, SAMHSA states:

"The Department does not specify which agency within the State is to be responsible for implementing the law. Enforcement of the law may be done by enforcement agencies, SSAs, private entities, or a combination of these and other organizations. The Department expects the Governor of each State to designate the most appropriate agency to assume lead responsibility for implementing these requirements. [¶] . . . Each State will have to consider the relative resources and capabilities of its various State entities and make a determination as to the most appropriate enforcement agency." 61 Fed. Reg. 1496-97.

2. *Is there an alternative to using "stings" to carry out the required inspections?*

SAMHSA's rules do not require "stings," but SAMHSA insists that a State use a method that will allow the State to measure the degree of retailer compliance with the State's minimum sales age, and to determine whether the State has met its negotiated compliance target. 61 Fed. Reg. 1493-94.

3. *What safeguards should be established to protect retailers against entrapment?*

SAMHSA acknowledges that "entrapment may be a potential problem for retailers." It expects States, if they use minors in inspections, "to develop procedures to address (and thereby avoid) these concerns and to educate officials regarding permissible and impermissible activities." 61 Fed. Reg. 1494.

4. *What safeguards should be established to protect minors who participate?*

SAMHSA acknowledges concerns regarding harm to minors participating in inspections. It expects States to provide "all of the necessary precautions to safeguard youth participants." 61 Fed. Reg. 1494.

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5. *What will the Center for Substance Abuse Prevention ("CSAP") be advising?*

SAMHSA says that following publication of the rules CSAP will provide to States "technical assistance and further guidance on state-of-the-art inspection processes, including guidelines, training and technical assistance, on which CSAP and CDC are collaborating." 61 Fed. Reg. 1494.

According to an HHS Inspector General's Report on State Oversight of Tobacco Sales to Minors, released last year, the Public Health Service already has prepared a "technical assistance guide" and plans to conduct a "technical assistance workshop" within two months following issuance of the SAMHSA rules.

6. *Does the State have to use "private entities" to help perform the inspections?*

No. Moreover, addressing concerns raised about the potential for "vigilantism," SAMHSA says that each State is responsible for demonstrating to SAMHSA that random, unannounced inspections have been conducted in "a fair, consistent, unbiased, planned manner." 61 Fed. Reg. 1494-95.

7. *Will retailers have a chance to comment on a State's submission to SAMHSA?*

Yes. The public will be afforded an opportunity to comment on the State's report prior to its submission to the Secretary. 61 Fed. Reg. 1497.

8. *How should the "probability sample" of outlets be designed?*

The term "probability sample" is not defined. It is possible that SAMHSA means a sample of outlets where it is most probable that young people would attempt to purchase tobacco products. SAMHSA apparently does not want inspections to be conducted in locations that are not accessible to minors and does not want inspections to "focus" on locations that are unlikely to have a substantial population of underage persons. 61 Fed. Reg. 1497. How outlets are to be selected for inclusion in the sample will be a key question. Should a State draw from a licensing list? A commercial business list? BATF tax rolls? Should "area sampling" or "community sampling" be used?

SAMHSA says that inspections are to be conducted so as to provide "a probability sample of outlets that youth are likely to frequent." 61 Fed. Reg. 1499. It thus appears that the sample should include only those types of outlets where minors actually go to buy tobacco products. (This would appear to require the State to conduct a survey of underage smokers before selecting the sample.) The sample

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presumably should not include all outlets where minors *might* be able to purchase tobacco products *if* they tried. SAMHSA seems to assume that minors are more likely to attempt to buy tobacco products from outlets near schools and similar centers of youth activities, rather than at more distant outlets where detection is less likely. This assumption is questionable.

It should be noted that multiple sales points within one location (e.g., a motel that offers cigarettes for sale in several vending machines as well as a gift shop) will be considered a single "outlet" for sampling purposes. 61 Fed. Reg. 1497-98.

9. *How many inspections must a State conduct each year under the rules?*

SAMHSA's rules do not say and SAMHSA does not suggest any particular number in the preamble. Nevertheless, in estimating the costs of the rules, SAMHSA cites an inspection system described in a CSAP publication:

"It was concluded that in most States the most cost-effective sampling method would rely on licensing or commercial business lists, use cluster sampling rather than random sampling, and cover 300-400 outlets in the smallest half of the States and about 600 outlets in the larger States. Furthermore, it was concluded that on average, it would cost approximately \$290,000 per State for an average State to develop a sampling design and conduct inspections, or about \$17 million a year nationally." 61 Fed. Reg. 1505.

10. *How should inspections be funded?*

SAMSHA says that it "recognizes the difficult funding decisions and the need to balance competing program priorities which States will face in order to implement this law." SAMHSA's rules permit the States to use funds from the primary prevention set aside of their SAPT Block Grant allotment under 45 CFR 96.142(b)(1) for developing the sample design and conducting the inspections required by the rules, but not other activities. SAMHSA also will allow States to use funds from the CDC's Preventative Health and Health Services Block Grant for sample design, inspection "and other enforcement purposes." 61 Fed. Reg. 1500.

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11. *How should general enforcement activities be funded?*

As noted, SAMHSA will allow States to use funds from the CDC's Preventative Health and Health Services Block Grant for enforcement purposes. 61 Fed. Reg. 1500. The States may, of course, finance enforcement from general revenues.

12. *Should criminal or civil sanctions be used?*

SAMHSA says it does not recommend that States use the criminal justice system as a primary means of enforcement. Instead, it says that a system of civil money penalties and fines would almost certainly be more cost-effective. 61 Fed. Reg. 1505.

13. *What should the interim performance target be for FY 1997 and subsequent fiscal years, heading toward the 20 percent objective after "several years"?*

SAMHSA says:

"[T]he Secretary will negotiate annually with each State an interim performance objective the State should meet each year. It is our expectation that all States will reach and surpass the performance objective of 20 percent within several years. The target level negotiated with each State should demonstrate each State's commitment to [1] furthering the ultimate goal of reducing tobacco use by underage youth, [2] reasonably reducing the availability of tobacco products to minors and [3] showing immediate and sustained progress toward meeting the 20 percent performance objective." 61 Fed. Reg. 1498.

14. *What should be the FY 1996 baseline?*

SAMHSA says:

"The results of the random, unannounced inspections in the third applicable fiscal year [FY 1996 in most States] (which are to be conducted in such a way as to provide a probability sample of outlets that youth are likely to frequent) will serve as the baseline. State-specific maximum failure rates will be negotiated for the first time for applications for the fourth applicable fiscal year which for most States is FY 1997. States are encouraged to complete their inspections for the third and all subsequent fiscal years in time to permit negotiations for the next fiscal year's application." 61 Fed. Reg. 1499.

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15. *Are States required enact additional youth access legislation?*

No. The only law a State must have is a law prohibiting the sale and distribution of tobacco products to persons under the age of 18. On the other hand, SAMHSA notes that additional laws can help reduce the availability of tobacco products to such persons. SAMHSA hints that having additional youth access laws may make it possible for the agency, in "extraordinary circumstances," to find that a State is in "compliance" with SAMHSA even if it has not met its negotiated compliance target. 61 Fed. Reg. 1495, 1499-1500.

16. *What role do the rules envision for local governments?*

SAMHSA specifically says that its rules "neither prohibit the States from preempting, nor require them to preempt, local initiatives on youth access to tobacco products." However, SAMHSA does encourage the States to allow localities either to enact stricter laws or to enforce state laws more rigorously. 61 Fed. Reg. 1496.

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